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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

**No. 182**

KENNETH C. GORDON AND KENNETH J. MACLEOD,
*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

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*Attorney for Petitioner MacLeod.*

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## REPLY BRIEF FOR PETITIONERS.

In Reply to the Brief for the United States in Opposition to the Petition for Writ of Certiorari, the Petitioners submit the following arguments:

### I.

### With Regard to the Limitation of Cross-Examination.

The Government's Brief in opposition to the Petition for Certiorari incorrectly states the questions presented, and the prejudice claimed, by reason of the denial of cross-examination. (Question 1, Government's Brief, p. 2.)

The Government assumes that the petitioners' claim of

prejudice arises from a refusal by the trial court to permit the petitioners to offer certain proof.

The petitioners do contend that they were prejudiced by denial of production of prior statements of the witness Marshall and by denial of leave to show affirmatively, the remarks regarding leniency by the judge before whom Marshall was awaiting sentence. However, this thwarting of attempts to prove affirmatively that the witness had made prior statements at variance with his testimony, and had named the defendants only after an admonition by the judge who was to sentence him, is only one facet of the errors complained of.

There was a complete and specific denial of cross-examination of the Government's key witness, Marshall, concerning these points. (R. 196-201.) At various points the attorneys for the petitioners again and again sought to ask questions which might elicit the facts demonstrated by their offers of proof. (R. 196, 198-201, 206, 207, 221, 222, 226, 228.)

The Court of Appeals, in its opinion (R. 496-497) refers to the fact that Marshall admitted he had not named the defendants in his first several written statements made to the F. B. I. It then reasons that the statements would not have impeached this admission, but completely overlooks the fact that the statements were made before admonition that if he expected leniency, or a recommendation therefor, Marshall would do well to advise the authorities of all persons involved. (R. 199.) No consideration was given to the possibility that the statements may have been completely exculpatory of the petitioners.

The petitioners contend that the motive of the witness in changing his story, after his plea of guilty and a judicial warning to aid authorities, was not subjected to the full light of searching examination which Marshall's character, as an informing accomplice required. (R. 494.)

Only the jury had the right or duty to judge what effect on Marshall's motives and testimony was created by the admonition of the judge who was to determine Marshall's fate, by sentence, after his testimony in the case at bar.

The jury was denied detailed or real knowledge of the contents of the statements made by Marshall, prior to his testimony; and indeed was completely denied any knowledge of the remarks implying leniency, made to him by Judge Levin in Detroit, who had withheld sentence of Marshall for some eight months. (R. 198-201.)

The determination of this part of the case by the jury was limited to the basis of Marshall's answers that his prior statements were consistent with his testimony, and that he had received no threats or promises regarding immunity. These answers were only his conclusions, even if honestly made. The evidence which would have enabled the jury to determine the truth of his answers, his character, his motive, and his relation to the government, was excluded by the trial court when it cut off *"in limine"* cross-examination on subjects to which the defense was entitled to a reasonable cross-examination.

This was an abuse of discretion and prejudicial error. *Alford* v. *United States*, 282 U. S. 687, 692.

The prejudice of the trial court's erroneous rulings in this regard were emphasized by its refusal of a suggested instruction regarding the care with which the testimony of a person who anticipates immunity should be weighed. (R. 425, 455.)

## II.

### With Regard to the Instructions to the Jury.

### A.

The Brief in Opposition does not argue in support of the language of the instructions complained of in the Petition for Certiorari.

The Government argues that in the instructions, the trial court gave a proper charge on the admission of evidence against each defendant. (Gov. Brief, p. 16.)

Four instances of the erroneous use of "either or both" are set out in the Petition at pages 15 and 16.

It is submitted that the language of this Court in *Bollenbach* v. *United States*, 326 U. S. 607, at page 612 is appropriate and we quote, "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

### B.

In so far as the supplemental instructions are concerned, the Government again seeks to excuse the obvious error of the trial court in charging the jury to consider the "opinions of others", by pointing to the unexceptional and unilluminating abstract charge that the jurors should consider "the opinion of each other". (Government Brief, pp. 17, 18.)

Certainly there is no question that the trial court made both statements to the jury. But neither statement limited or modified the other. The inclusion of both gives the instruction the status of an order to consider the opinion of *others* and of *each other*.

The Petitioners argue that the charge that the case

"must at some time be decided" is not harmless error when considered in the light of the hour at which it was given, that is, 10:30 P. M. after the mixed jury of men and women had been confined for eleven hours.

The importance of this instruction cannot be overlooked, for the jurors, themselves, asked for a written copy of it, an hour after it was given orally. Certainly, it cannot be assumed that the jurors were not affected by any phrase of the charge. It is reasonable to consider that the jurors may have dissected the charge and argued each sentence for meanings not usual or clear to laymen.

In the case at bar, after informing the defendants and their counsel, that no further instructions would be given to the jury, the court on request by the jury, not known to the defendants, sent the supplemental instruction to the jury. The defendants' attorneys later learned of this, a day or so after sentence and put their objections of record. (R. 470-474.)

Thus, in effect, the erroneous and prejudicial admonition in the charge that "the case must at some time be decided" and that the jurors should consider the opinions "of others" and "of each other" was repeated, this time in writing. The hour was 11:30 P. M. and the men and women of the jury had been confined in deliberation for 12 hours. Their verdict of guilty was returned at 3:10 A. M., the following morning.

## III.

### With Regard to Proof of Value.

In its answer to the Point V of the Petition (p. 19) the Government has appraised the value of the witness Vayo too highly. (Gov. Br., 19.)

The Government in its Brief (p. 19) states that Vayo, a traffic manager, testified to prices as set forth in the "official" Eastman price list. This witness, however, also testified that his company put out many price lists, perhaps a hundred, and that he was not familiar with the lists, did not know the prices of any sales at retail in Chicago, and was not familiar with matters issued by the sales department. (pp. 72, 73.) He was a traffic manager.

The heart of the Petitioners' point in this regard is that neither the witness nor the price list were competent to prove *value*. No other evidence was introduced. The issue involved is *value*, not price.

The list did not contain any mention of one of the four types of film. (R. 64.) The witness could not evaluate the factor of value involved in processing or developing. (R. 71.) The Government's statement that the right to have the film processed attaches to the film (Gov. Br., 19), has no basis in the evidence and is invalid in law, because certainly, an inchoate right to have the film processed or developed would not be subject to enforcement or have value to anyone but a purchaser for consideration which had passed to the Eastman Co.

Thus the film alone, before sale for consideration creating a contract to develop it, is far less valuable than the film coupled with the right of development.

The figures put in evidence over objection of the defendants included the price of the development contract. (R.

71.) However, these figures were introduced with no proper foundation or basis for their admission.

The Petitioners contend that they were not convicted on competent and probative evidence in so far as the statutes require proof of value in excess of $5,000.00.

## Conclusion.

The Petitioners respectfully submit that a Writ of Certiorari should issue so that the substantial and prejudicial errors in their trial may be examined and their conviction reversed.

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